No. 3017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

BENJAMIN L. McKINLEY,
A. J. MORGANSTERN,
Attorneys for Plaintiff in Error.

Filed this ..... *day of September, 1917.*

FRANK D. MONCKTON, *Clerk.*

By ..... *Deputy Clerk.*

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Statement of the Case.

The plaintiff in error, Alexander Gladstone, indicted under the name of William Vines, was indicted jointly with one Morris Friedlander, alias H. Franklin, in the United States District Court for the Southern Division of the Southern District of California, upon a charge that they did, on December 23, 1915, in the County of San Diego, knowingly, unlawfully, wilfully and feloniously have in their possession, receive, conceal, transport and facilitate the transportation and concealment

of a quantity of opium prepared for smoking, which said opium was then and there contained in one hundred eighty cans of the size and style commonly denominated five-tael, and which said opium had been imported into the United States subsequent to the first day of April, 1909, contrary to law, all of which was well known to said defendants at the time they so received, concealed, transported and facilitated the transportation and concealment of said opium. The indictment is found on pages 5, 6 and 7, Transcript of Record.

The defendant Friedlander or Franklin did not pursue his writ of error and accordingly the Gladstone case is the only one before this Court.

The defendant Gladstone or Vines was arraigned January 17, 1916, answered his true name and pleaded not guilty to the indictment (page 8, Transcript of Record). On September 12, 1916, when the cause came on for trial, the defendant's counsel made a motion for a continuance of the trial. The motion, the affidavits in support thereof, the testimony taken in support of the motion, and the action of the Court in denying the continuance is found in the transcript of record, pages 38 to 53 inclusive.

The motion for continuance (page 38, Transcript of Record) states the fact

> "That heretofore a stipulation was had by and between John B. Elliott, Collector of Customs for the Port of Los Angeles, and A. J. Morganstern, Esq., attorney for the above-named defendant. The nature of which and the full purpose of which are set out in the

affidavits of A. Gladstone and Morris Friedlander, on file herein, hereby referred to and by such reference made a part hereof as fully as though the same had been specifically herein impleaded. It is now apparent to the defendant and to their counsel that there is no intention upon the part of the Government to keep the said stipulation and the purpose of the proposed continuance is to enable the above-named defendants to apply to the President of the United States for executive action in the matter, in the manner by law provided.

This motion will be based upon the affidavits of A. Gladstone, Morris Friedlander and C. E. Burch, filed herein, and upon the records and files in the above-entitled court in the above-entitled cause."

The affidavit of A. Gladstone (pages 39 and 40, Transcript of Record) sets forth in substance that he is one of the defendants in the pending action; that he was arrested with his codefendant in San Diego County, California, and lodged in the county jail in said county; that while so incarcerated he retained A. J. Morganstern, Esq., as his attorney, and that he was advised by said A. J. Morganstern that he had had a conference with Hon. John B. Elliott, Collector of Customs for the Port of Los Angeles, and that the said Elliott had agreed with said Morganstern that if the affiant, Gladstone, would truthfully disclose where the opium was obtained which he was charged with transporting, and where it was to be delivered, that recommendation would be made to the office of the District Attorney that the case against Friedlander, or Franklin, would be dismissed, and that upon the

plea of guilty by Gladstone a nominal fine would be suggested to the Court as satisfactory to the Government. That Gladstone thereupon agreed to make full and complete disclosure as he could, and that in a day or two afterwards he was taken to the office of Mr. Elliott in the Federal Building, in San Diego, and there in the presence of U. S. Commissioner Burch, John B. Elliott and Mr. Morganstern, his attorney, the same stipulation which Mr. Morganstern had repeated to him, Gladstone, was again entered into between Mr. Morganstern and Mr. Elliott in the presence of Commissioner Burch and Gladstone, and that Gladstone was assured by Mr. Elliott that nothing he might say would be used against him, or for any other purpose than for carrying out said agreement and stipulation.

Gladstone proceeds further to state in his affidavit that he thereupon told Mr. Elliott all he knew of the transaction, from beginning to end, fully, fairly and truthfully. He further states that he is now informed by his attorney and upon information and belief alleges the fact to be that there is no intention upon the part of the Government, represented by its Collector of Customs, to carry out the promise made to him, and that upon a later occasion upon an application addressed to the Court, while Judge Cushman was presiding, for the reduction of Friedlander's bail, the Assistant District Attorney present started to read from a transcription from Gladstone's statement to Collector Elliott, and

sought to use the same in contesting the application for reduction of bail, and did read a portion thereof until stopped by the Court, upon objection by Mr. Morganstern, from further using it.

Friedlander's affidavit (pages 41-42, Transcript of Record) recites the fact as to his arrest and incarceration, and his employment of Mr. Morganstern to represent him. He then proceeds to state in substance that he was taken to the office of Mr. Elliott in the Federal Building at San Diego, and that in the presence of Mr. Elliott, Mr. Morganstern and U. S. Commissioner Burch, was told by Morganstern that the purpose of his being called there was as follows:

> "That Mr. Gladstone had assured Mr. Elliott, the Commissioner, and Mr. Morganstern, that I had no knowledge whatever of the purpose of the trip Gladstone and I had taken, and was entirely unaware of the fact that opium was being transported, and that I played no part therein, and that it was stipulated between Mr. Morganstern and Mr. Elliott that if both Gladstone and I should tell all we knew and should fully and fairly disclose the truth, that the case against me would be dismissed and that the Government would suggest a fine in the Gladstone case. Thereupon, in the presence of the persons stated, I fairly, fully and truthfully stated all that I knew about the trip to Mr. Elliott, expecting that as a result thereof the promise made on behalf of the Government by the said John B. Elliott would be kept; that I am entirely innocent of any wrongful act charged against me in connection with the above-entitled matter."

It was stated by Mr. Morganstern, counsel for the defendant Gladstone (page 43, Transcript of Record), and this was not disputed, that at one conference between Mr. Elliott and Mr. Morganstern Mr. Schoonover, the U. S. Attorney, was present; that this conference was held after the finding of the indictment, and that Mr. Schoonover knew the statements that were being taken. This was in answer to the suggestion by the Assistant U. S. Attorney Mr. O'Connor (page 43, Transcript of Record) that the case being in the hands of the District Attorney's office, negotiations should have been had with that office. U. S. Commissioner Burch was called as a witness for the Government in the matter of this application for a continuance, and his testimony is found on pages 45 and 46 of the Transcript of Record. His testimony sheds but little light upon the interview of Mr. Elliott with Gladstone, Friedlander and Morganstern. He did not hear any conversation held between Mr. Elliott and Mr. Morganstern (page 46, Transcript of Record). He does not undertake to give the details of the conversation held in his presence, in fact he says he cannot recall the details of the conversation (page 46, Transcript of Record) and the only conclusion that can be drawn from his testimony is that other things were said which he either did not hear or does not remember. There was one witness whose testimony would have been vital in support of the position of the Government that no such promises had been made, as are stated in the

affidavits. That witness was Collector John B. Elliott. He was not called and no excuse appears for failure to call him. Mr. Schoonover, the United States Attorney, was not called, and no excuse or reason appears in the record for not calling him. Under a rule which is too well settled to require the citation of authorities, it should be presumed, at least in the case of Mr. Elliott, that if he had been called he would have given testimony unfavorable to the contention of the Government.

The testimony of A. J. Morganstern, counsel for the defendants, found on pages 47 to 53, Transcript of Record, is a detailed statement of the entire transaction with reference to the promises made by Mr. Elliott. This statement fully bears out the statement made in the affidavits already referred to. It appears that a promise was made; that Gladstone told the story in answer to interrogatories by both Mr. Elliott and Mr. Morganstern; that Mr. Elliott made lead pencil notes of the conversation, and that Mr. Morganstern asked additional questions whenever necessary to elicit the entire truth (pages 48 and 49, Transcript of Record).

It appears further that a conversation was had with Mr. Schoonover, the United States Attorney, in which he said he would not *nolle pros.* the case because "we cannot convict anybody else on this testimony" (page 49, Transcript of Record). Mr. Morganstern replied (pages 49 and 50, Transcript of Record):

> "That was not agreed, Mr. Schoonover, with Mr. Elliott, nor was it ever discussed; no promise was ever made by me or by the defendants that they would give you evidence which would convict somebody else; I agreed with Mr. Elliott to have these defendants tell him whatever they knew about their trip, to have Gladstone tell him where the opium was obtained, how it was obtained, and whence it was to be delivered, all of which Gladstone did, I thought at the time, fully and fairly."

Without calling Mr. Elliott or Mr. Schoonover as a witness the Court denied the motion for a continuance and the defendant took exception to the ruling (page 53, Transcript of Record). A jury was then empaneled and the trial proceeded, the testimony of the witnesses being found on pages 53 to 85 inclusive, Transcript of Record. That testimony shows substantially that on September 23, 1915, the defendants were arrested at a place called Spring Valley, in an automobile driven by a man named George, and accompanied by another man named Fullerton. That in the automobile were found a suit case and a black box, to which neither of the defendants had any keys (page 54, Transcript of Record). In the course of the testimony of the witness Thomas L. Rynning the following occurred (pages 53 and 54, Transcript of Record):

> "Q. (by Mr. O'Connor). What conversasation did you have in the presence of these defendants when you first went up to the automobile?
>
> Mr. Morganstern. We object to any conversation either by or in the presence of the

defendants which seeks to elicit any possible statement by the defendants or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial until the *corpus delicti* shall first have been established.

The COURT. State what was said.

Mr. MORGANSTERN. Exception."

The man George was not produced as a witness on the trial, his absence was not accounted for, and while there is no satisfactory or sufficient showing as to who was the owner of either of the receptacles containing the opium, there is as much evidence that George was the sole owner as there was that they were owned by anyone else.

At the close of the testimony for the prosecution, as shown by the minutes of the Court, defendant's counsel moved the dismissal of the cause (bottom page 14, top of page 15, Transcript of Record). The motion was denied and an exception taken to the ruling of the Court. The jury thereafter found the defendants guilty as charged. At the time fixed for pronouncing judgment a motion was made by Mr. Morganstern for the defendants for postponement to a later date of the passing of sentence on the defendants sufficient in time to permit the defendants to have their application for executive clemency passed upon by the President of the United States. The proceedings at that time are set forth on pages 85 and 86, and are as follows:

"Mr. MORGANSTERN. If the Court please, this is the time fixed for sentence of the defendants William Vines and H. Franklin, and at this

time the defendants move that the Court continue the time of passing sentence on the defendants to some later date sufficient in time to permit these defendants to have their application for executive clemency passed upon by the President of the United States. The application for executive clemency has been made and is now pending before the President of the United States. The grounds upon which this application for executive clemency is being made are the same that have already been gone into detail before your Honor prior to the trial of this cause, and these defendants are making this motion at this time, based upon the same grounds heretofore made, because at the time this motion was made before at the trial of this cause, the United States Attorney opposed the defendants' motion for a continuance on the ground that the proper time to make such an application to the President of the United States was after conviction and not prior thereto. Therefore to save our rights in the premises we now renew the motion for a continuance of the time fixed for pronouncing sentence until the defendants' application for executive clemency can be passed upon by the President of the United States.

The COURT. Motion denied."

The sentence was thereupon pronounced against the defendant, of imprisonment for the term of eighteen months in the United States Penitentiary at McNeil Island, Washington (page 35, Transcript of Record).

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors (pages 91 to 93, Transcript of Record) assigns the following errors in the proceedings in the Court below:

"I.

"That the Court erred in denying the motion of the defendants above named for a continuance of the trial of the above-entitled cause. Said motion for continuance being made for the purpose of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of the said defendants.

II.

That the Court erred in overruling the objection of the defendants to the question put to the witness Thomas L. Rynning: Q. 'What conversation did you have in the presence of these defendants when you first went up to the automobile?' Said objection being taken as follows: 'We object to any conversation held by or in the presence of the defendants, which seeks to elicit any possible statement by the defendant or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial, until the *corpus delicti* shall have first been established,' and the defendants' exception to the ruling on said objection was duly and regularly taken and allowed.

III.

That the Court erred in overruling the motion of the defendants above named for a continuance of the time for pronouncement of judgment and sentence in the above-entitled cause upon said defendants. Said motion for continuance being made for the purpose of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of said defendants.

IV.

That the Court erred in refusing to give the following instruction to the jury, as requested

by the defendants: 'You are instructed that the evidence adduced in this case is insufficient to warrant or sustain a conviction of the defendants, or either of them, and I therefore instruct you to find the defendants not guilty on said indictment.'

V.

That the Court erred in pronouncing sentence against the defendants."

These assignments may be divided for convenience into the following heads:

1. The Court committed error in refusing a continuance of the trial for the purpose of making application to the President for executive clemency, and committed the same error in refusing a continuance of the time for pronouncing judgment for the same purpose. The proceedings upon the application for continuance of the trial are found on pages 38 to 53 of the Transcript of Record, and those upon the refusal of the continuance of the time of pronouncing judgment are found on pages 85 to 86 of the Transcript of Record.

2. The Court erred in permitting the question (pages 53 and 54, Transcript of Record) put by the prosecution to the witness Thomas R. Rynning: "What conversation did you have in the presence of these defendants when you first went up to the automobile?" Said objection being taken as follows: "We object to any conversation either by or in the presence of the defendants which seeks to elicit any possible statement by the defendants or actions of the defendants, upon the ground that

it is incompetent, irrelevant and immaterial until the *corpus delicti* shall first have been established."

3. That the evidence was insufficient to justify a conviction; that Section 3 of the Act of January 17, 1914, by virtue of which alone the defendant could have been convicted is unconstitutional, and the instruction requested as to the insufficiency of the evidence should have been given, the motion for dismissal (pages 14 and 15, Transcript of Record) should have been granted, and that the Court, therefore, erred in pronouncing sentence against the defendants.

Argument.

I.

ERROR OF THE COURT IN DENYING MOTIONS FOR CONTINUANCE.

In support of our contention under this head we call the attention of the Court to the case of *United States v. Ford,* 9 Otto. 594, 24 L. Ed. 399.

That case, we submit, is authority for the proposition that in a case like the present, where the testimony shows without any contradiction whatsoever, that the promise was made to the defendant by a high and responsible officer of the Government, and that the Government had no intention of keeping the promise, the Court should grant a continuance of the trial of the cause in order to afford the defendant an opportunity of making an appli-

cation to the President for executive clemency. It is no answer to this position to say as Mr. O'Connor, the Assistant U. S. Attorney, said in the Court below (page 44, Transcript of Record) that "the defendant has had six months in which to make his application to the President, if such an application could be made and he has failed to do so". Mr. Morganstern furnished the answer to that argument in his answer to a question by the Court (page 44, Transcript of Record; also bottom page 42, top page 43, Transcript of Record). Equally so, it would not be a sufficient answer to our position, that the application could be made since the date of the trial, and up to the present. It is hardly likely that the President of the United States would take action in the matter while a writ of error was pending to this Court. The time to have permitted the action, and to have granted the continuance for the purpose of permitting the action, was at the time of the application for a continuance of the trial in the Court below, or at any rate, at the time of the application for a continuance of the sentence, after the defendant's conviction. As we have before remarked, it is very significant that there is not a word of contradiction in the record of the affidavits made by the defendants or of the sworn testimony given by their counsel. Mr. Burch, the United States Commissioner, who was probably not specially interested in the matter, has only a hazy and fragmentary recollection of what happened, while Mr. Elliott,

the Collector, who was the one man most directly and vitally concerned, and who could have settled the matter positively so that there would have been no possible chance for misunderstanding, was not even called as a witness. We ask the Court to presume that if he had been called his testimony would have agreed with that of Mr. Morganstern, Mr. Gladstone and Mr. Friedlander. In any event, this is not a case where there was a conflict of testimony, and where the discretion of the Court could be exercised either way. It is a case in which the testimony is all one way, and under the Ford case we submit that the discretion should have been exercised in favor of granting the continuance. To the same general effect as the Ford case, see

Ex parte Wells, 18 Howard 307; 15 L. Ed. 421;

United States v. Wilson, 7 Peters 150; 8 L. Ed. 640;

United States v. Lee, 4 McLean 103;

People v. Whipple, 9 Cow. 707.

A reading of these cases will demonstrate that while an agreement of the character made on behalf of Gladstone is one which cannot be enforced in the Courts, it has been the policy of the law, which has endured for a century, that in such cases it is the duty of the Court to postpone the trial until the executive shall have acted in the premises. The same arguments used as to the duty of the Court to postpone the trial will apply with equal

force to the motion made by counsel for plaintiff in error (pages 85 and 86, Transcript of Record) for a continuance of the time of passing sentence upon him to a later date sufficient in time to permit him to have his application for executive clemency passed upon by the President of the United States.

II.

ERROR OF THE COURT IN PERMITTING A QUESTION OF A WITNESS FOR THE PROSECUTION AS TO A CONVERSATION HAD WITH PLAINTIFF IN ERROR AND HIS CODEFENDANT BEFORE THE CORPUS DELICTI HAD BEEN ESTABLISHED.

The testimony in question, together with the objection, is found on pages 53 and 54, Transcript of Record. It is ordinarily quite true that the order of proof is a matter which is within the discretion of the Court, but the objection raised in this case, to this question, and to other questions along the same line becomes of considerable importance in view of the fact that the *corpus delicti*, which was the unlawful possession of unlawfully imported opium, was never proved at all.

Under the head of the next assignment of error we shall discuss at more length the evidence upon this point, and we shall contend that there was no evidence whatever upon this vital point except such as was supplied by Section 3 of the Act of January 17, 1914, which we shall contend is unconstitutional.

The counsel for the defendant in the Court below saved an exception not only to this question, but to all other questions along the same line (page 54, Transcript of Record). The testimony of the witness Thomas L. Rynning (Transcript of Record, pages 53 to 58) shows that neither of the defendants had any keys which would open the packages containing the opium, and it does not appear that any keys were found upon them. In fact, it appears (page 57, Transcript of Record) that as soon as the plaintiff in error and his codefendant had fully understood what was asked of them they stated that the packages were not theirs, and no keys were found upon their persons and the packages were broken open at the county jail. This witness tried every key that Gladstone had in his pocket but they did not fit the grips. They were searched for arms and no arms were found.

The witness Fullerton, who admits (page 77, Transcript of Record) that he had been convicted of felonies at least twice, was arrested and immediately released under the orders of Mr. Evans, a Deputy Collector (page 57, Transcript of Record). Another man George, who was driving the car, was not even searched for keys or arms and was never placed under arrest (Transcript of Record, pages 57 to 58). George was not called as a witness on the trial, and no reason was given why he was not.

The second witness for the Government, William Landis (pages 58 to 62, Transcript of Record), testified that his remarks were addressed to Frank-

lin, or Friedlander, the codefendant of Gladstone, the present plaintiff in error (page 58, Transcript of Record). When they were asked for the keys the following took place (page 59, Transcript of Record):

> "I asked him where the keys were. He says, 'I haven't any keys.' I said, 'Where is the keys so that we can open them?' He says, 'I don't know; they don't belong to us.' Vines said that; then the under-sheriff says, 'Well, we will bust them open,' and Vines says, 'Well, I don't care, they are not ours.' 'Well,' he said, 'you just stated they belonged to you, several times.' 'Well, they are not ours,' he says. * * * the first words I remember Vines saying was when we asked him for the keys."

At this time (page 60, Transcript of Record) counsel for the defendant again renewed the objection which is the subject of this assignment. The witness continued (page 60, Transcript of Record) stating that Vines, the plaintiff in error, in answer to a question as to what was in the suit cases, said that he did not know.

Stress will no doubt be laid upon the statement that the grips "belong to us". When it is considered that there were four persons in the party, that the only two persons arrested denied any personal ownership of the grips, denied any knowledge of their contents; that no keys to fit the grips were found upon the persons of either of them, and that one witness was never searched, was never arrested, and has disappeared, it will be seen that the evidence of ownership or guilty knowledge on

the part of Gladstone is so negligible that it should not be permitted to go to a jury and that the objection of counsel to the testimony in question should have been sustained.

The next witness, Horace U. Kennedy (pages 63 and 64, Transcript of Record) simply states that plaintiff in error and his codefendant registered in a hotel in San Diego December 21, and that after they had registered the two grips in evidence were brought in from the stage office. It does not appear that either of these men brought them in, that they had any conversation about them, or that they made any claims to them.

The next witness, D. J. Davidson (Transcript of Record, pages 65 to 68) says nothing about baggage at all, but the mysterious Mr. George who disappeared and Mr. Fullerton who was released are found at a hotel at El Centro, with a suite of rooms, and Davidson never saw them again. George engaged the rooms.

The testimony of the next witness, Belle M. Riggle, throws no light upon the matter in question.

The testimony of Earl R. Fullerton, the last witness called for the Government, is found on pages 68 to 77 of the Transcript of Record. He testified that although he owned the car in which the trip was made (page 71, Transcript of Record) the mysterious Mr. George, who is missing, drove the car upon the journey (Transcript of Record, page 69). This witness says that at the Castle Ray

Hotel Gladstone and Friedlander each came out with a grip in his hand (page 73 also page 75, Transcript of Record). He denied that he had testified at the preliminary examination that he did not know who brought them out of the hotel; that when he first saw them they were on the sidewalk with the two men, and that he helped to lift them into the automobile.

The witness William Carse, a Deputy United States Marshal, called on behalf of the defendants, flatly contradicts this testimony (page 77, Transcript of Record) and this witness is therefore thoroughly discredited in a very important part of his testimony. This circumstance, together with the fact that this witness, admittedly a convicted felon, and therefore incompetent to be a witness, was also on this journey with the absent Mr. George, and was never arrested and never searched, and the other fact that no keys to fit these suit cases were found upon the person of either of these defendants, shows that the evidence of the *corpus delicti* was entirely absent, and that the action of the Court in permitting the line of questions objected to was not only error but was highly prejudicial to the plaintiff in error.

The codefendant, Morris Friedlander (pages 78 to 85, Transcript of Record) denies that he ever touched the suit cases, and did not see the plaintiff in error, Vines or Gladstone, handle them either. The only person whose testimony even hints at

such a thing is that of Fullerton who has been thoroughly discredited.

For these reasons we submit that the action of the Court above noted was error prejudicial to the plaintiff in error.

III.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY A CONVICTION. SECTION 3 OF THE ACT OF JANUARY 17, 1914, WHICH ATTEMPTS TO SUPPLY THE DEFECT IN PROOF IS UNCONSTITUTIONAL AND THE CAUSE SHOULD HAVE BEEN TAKEN FROM THE JURY ON THE MOTION OF THE DEFENDANT.

We desire to urge this last point very earnestly upon the consideration of the Court.

The indorsement upon the back of the indictment (page 7, Transcript of Record) shows it to be "An indictment for Viol. Sec. 2, Act Jan. 17, 1914. Having in Possession, Receiving, etc., Smuggled Smoking Opium". The Act of January 17, 1914, is an amendment of the Act entitled "An Act to Prohibit the Importation and Use of Opium for other than medicinal purposes", approved February 9, 1909, 35 Stat. L. 614. The Amendatory Act is found in 38 Stat. L., page 275. The Act of February 9, 1909, contained two sections. By the first it was enacted that after April 1, 1909, it should be unlawful to import into the United States opium in any form, or any preparation or derivative thereof, with the proviso added that opium and

preparations and derivatives thereof, other than smoking opium, or opium prepared for smoking could be imported for medicinal purposes only under regulations of the Secretary of the Treasury, and subject to duties imposed by law. Section 1 was unchanged by the amending Act of January 17, 1914.

Section 2 of the Act of February 9, 1909, provided:

> "(PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

This section likewise is retained in exact words in the amending Act of 1914.

Under the Act of 1909, in order to secure a conviction against a defendant, the Government was

required to show to a moral certainty and beyond all reasonable doubt, that the defendant had possession of opium which had been imported after April 1, 1909, and if that was shown to be the case that evidence was declared to be sufficient to authorize his conviction unless he should explain to the satisfaction of the jury the fact of his possession of such unlawfully imported opium.

Several other sections were added to the original Act by the Act of January 17, 1914. Among these was Section 3 which reads as follows:

> "(PRESUMPTION—BURDEN OF PROOF.) That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

A reference to the testimony contained in the transcript of record will show conclusively (pages 53 to 85 inclusive, Transcript of Record) that there is absolutely no evidence tending even in the remotest degree to establish the fact that this defendant had in his possession, received, concealed, transported, or facilitated the transportation or concealment of any opium which had been imported into the United States either subsequent to April 1, 1909, or at any other time or at all. In other words, there is an absolute failure to prove that the opium which is the subject of the testimony was

ever imported into the United States at all. We think that it must be conceded, in view of the language of Section 2 of the Act of 1914, that there could have been no conviction in this case except by virtue of the "presumption" which is attempted to be fastened upon the defendant by the language of Section 3. Our contention is, in brief, that Section 3, containing, as it does, not merely a presumption, but a presumption based upon another presumption, is a violation of the 5th Amendment of the Federal Constitution in that it deprives the defendant of his liberty without due process of law.

Our contention as to the unconstitutional character of Section 3 of the Act of 1914 can be readily understood by considering its effect upon a person charged with a violation of this Act. Let us take the case of the present defendant. He was arrested at a place called Spring Valley (page 53, Transcript of Record). The location of Spring Valley is not definitely given in the testimony, but it appears from the testimony of Wm. Landis (page 58, Transcript of Record) that he was the Deputy Sheriff of San Diego County, and it might be inferred that the place was somewhere near San Diego.

In an automobile in which this defendant was riding, together with his codefendant Morris Friedlander, and at least two other men, one Earl R. Fullerton and one George (page 53 and page 58,

Transcript of Record), were found a suit case and a black box to which neither of the defendants had any keys, and therein were found some cans of opium prepared for smoking.

The man "George" was not produced as a witness on the trial, and so far as anything is shown by the record there is as much evidence that he was the owner of these receptacles as there was that they were owned by Gladstone or Friedlander. It cannot, therefore, be said, in the first place, that there was any satisfactory evidence, or any evidence which ought to have been permitted to go to the jury, that this opium was in the possession of the defendant Gladstone. But, assuming for the sake of argument only, that the jury would have been justified in finding that the opium in question was in Gladstone's possession, it next became necessary, in order that the Government should prevail, for the District Attorney to prove that this opium had been imported into the United States contrary to law. A glance at the provisions of Sections 1 and 2 of the Act will make this clear. Section 1 forbids the importation into the United States of opium in any form or preparation or derivative thereof, with certain exceptions. Section 2 provides that if any person shall fraudulently or knowingly import or bring into the United States or assist in so doing, any opium or any preparation or derivative thereof, contrary to law, or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment or sale of

such opium or preparation or derivative thereof *after importation,* knowing the same to have been imported contrary to law, *such opium* or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished in the manner prescribed. Then follows this provision:

> "Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of *such opium* or preparation or derivative thereof, *such possession* shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain *the possession* to the satisfaction of the jury."

The defendant then must be shown to have or to have had possession of *such opium,* meaning opium which had been fraudulently or knowingly imported or brought into the United States contrary to law. Thus far the presumption is a reasonable one, and the constitutionality of this section has been upheld by the Courts. But Section 3 builds another presumption on top of this one, and a defendant is told, in effect, that if at any time after July 1, 1913, he is found with any opium in his possession, the Government is not only not required to prove that he assisted in importing it contrary to law, but the Government need not even prove that the opium ever came into this country at all; that from the mere fact that opium, the origin of which is unknown, is found in his possession, it is presumed, in the first place, that it was imported

contrary to law, and second, that he assisted in importing it.

We do not deny the proposition that it is ordinarily within the limitations of legislative power to prescribe the rules of evidence which are to be observed in Courts of justice, to establish presumptions and to state what shall constitute *prima facie* evidence in certain cases. In the case of Section 2 of the Act of 1914, identical in terms with Section 2 of the Act of 1909, this power has been exercised. Another example is found in Section 3082 of the Revised Statutes of the United States which denounces generally the offense of unlawfully importing or bringing merchandise into the United States contrary to law, and receiving, concealing, buying, selling, etc., such merchandise after importation. This section has been upon the statute books of the United States for many years, the original having been passed March 2, 1799, and another one July 18, 1866. It will be seen that the language of Section 3082 is identical with that of Section 2 of the Act in question substituting the word "merchandise" for "opium". But while the law making power has the right to authorize the drawing of inferences from facts, the cases are uniform to the effect that there must be a rational connection between the fact proved and the fact authorized to be inferred therefrom. If a person is found in possession of merchandise, whether it be a silk handkerchief or opium, which has been imported into this country contrary to law, he is

not deprived of his constitutional right to due process of law because Congress has seen fit to say that such evidence is sufficient to authorize his conviction unless he explain the possession to the satisfaction of the jury. The reason is, that there is some rational connection between the possession by a person of goods which have been unlawfully brought into the country, and knowledge of their unlawful entry on his part, and transportation and concealment thereof with such knowledge. But where Congress undertakes to say that on and after a certain arbitrary date, July 1, 1913, *all smoking opium or opium prepared for smoking found within the United States* shall be presumed to have been imported after the first day of April, 1909, and where Congress further places the burden of proof on the accused, to rebut that presumption, we most respectfully but earnestly contend that there is no rational connection between the fact, namely, the presence of smoking opium in the United States, and the conclusion to be inferred from it, or the inference to be drawn from it, that it was imported into this country contrary to law, or that it was imported at all. We insist that it is not competent for Congress to enact, that on finding a can of opium in a man's possession, it shall be presumed (1) that the opium was imported into the United States and was not produced here, (2) that it was imported contrary to law, (3) that the defendant knew these facts, and (4) that he

received and concealed the opium with such knowledge.

There is one case, *United States v. Yee Fing,* 222 Fed. 154, decided by the United States District Court for the District of Montana, which holds adversely to our contention. With all due respect to the learning of the Judge who presides over that Court, we earnestly insist that the reasoning whereon the decision is based is unsound, and we ask this Court not to follow it. The learned Judge begins his discussion, after referring to the Acts of February 9, 1909, and January 17, 1914, by saying (pages 155-156):

> "These statutes provide for presumptions or prima facie proof of the offense, which, while sufficient to sustain a verdict of guilty, may or may not be sufficient to satisfy the jury of the guilt of the accused beyond a reasonable doubt. They are but what are commonly styled rules of evidence and not substantive law creating offenses, and do not deprive the jury of its function of weighing evidence and determining facts. Though the accused presents no evidence, the circumstances inevitably appearing in the prosecution's evidence, may often be such that the jury will and should refuse to draw the inferences these statutes authorize, but do not and probably could not command, in that it is not satisfied they should be drawn—not convinced that the accused is guilty beyond a reasonable doubt."

As we have before remarked, it is undoubtedly the law that Congress has a right to direct inferences to be drawn from facts provided there is a rational connection between the facts proved and

the inferences drawn therefrom, that the inferences are not so unreasonable as to be mere arbitrary mandates, and that the party affected is free to oppose them. Indeed the Court in the Yee Fing case states this rule on page 156.

We submit that it is not enough to say that the jury may not wish to draw this inference. The answer is that the Act of Congress authorizes them to draw it. It is a fundamental right of a defendant to remain silent, and to require the prosecution to prove every fact and every element to establish his guilt to a moral certainty and beyond all reasonable doubt. It is also fundamental that every defendant without exception is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. It is true that this moral certainty may be arrived at by a jury by circumstances, and that inferences may be drawn by them from facts established, but only, as the learned Judge in the Yee Fing case admits, when there is some rational connection between the facts proved and the facts inferred therefrom, and where the inferences are not so unreasonable as to be mere arbitrary mandates. We submit that there is no more connection between the possession of a can of smoking opium and the importation thereof, lawfully or unlawfully, from a foreign country, than there would be between the possession of a silk handkerchief of Chinese workmanship, and the unlawful importation of such handkerchief from China. Opium of all kinds is

not forbidden to be imported, and it is within the judicial knowledge of the Court, as a matter of science, that prepared smoking opium can be and is manufactured from crude opium or gum opium; that there is no necessary reason why this process of manufacture must have taken place in a foreign country rather than on American soil, and that, therefore, there is no logical connection between the possession of smoking opium, and the inference sought to be drawn that it was unlawfully imported and the defendant knew it.

The Court in the Yee Fing case makes the admission (page 156) that

> "the presumptions here involved, though beyond any in revenue laws or elsewhere brought to the attention of the court, appear to come within the limits of the legislative power".

We respectfully submit that a consideration of the matter will show that they do not. Section 3082 of the Revised Statutes, containing the same provision as is found in Section 2 of the Act in question, goes as far as the legislative power had any right to go in establishing a presumption in a case like this; and the fact that that section has remained unchanged upon the statute books for many years and has apparently been found sufficient to remedy the evil which was aimed at thereby, is ample evidence of the fact that some doubt has existed as to the right of Congress to go further. It will probably be answered, in reply to this argument, that it is a difficult thing for the

Government to show that the particular can or number of cans of opium, found in a man's possession, were unlawfully imported into the United States, and that, therefore, Congress was justified in adding the presumption contained in Section 3 for the laudable purpose of suppressing the injurious traffic in opium. The answer to this contention is (1) that no man can be deprived of his constitutional right to life, liberty or property by any means which do not constitute due process of law, no matter what the evil which is to be remedied; (2) that in a criminal case the greatest presumption in favor of a defendant is that of innocence, and that the practical benefit of that presumption cannot be taken away from him by placing upon him burdens which he ought not to be made to assume, and which he very probably could not assume; (3) that there is no rational basis for the indulgence of the presumption enumerated in Section 3, because there is no reason why prepared smoking opium should be presumed to have been imported from abroad rather than to have been manufactured here.

The learned Court in the Yee Fing case seeks (page 156) to dispose of this last point by saying "The Court takes judicial notice that opium is not commercially a domestic product". We have been unable to find any basis in the authorities for this statement of the Court. Judicial notice is taken of facts which are so general and so notorious and of so public a character that, as they are

generally known, the Courts also should be presumed to know them. We submit that there is nothing in any of the decisions, so far as we have examined them, which would authorize the Court to judicially know whether opium is or is not commercially a domestic product. There is nothing in the nature of the soil of this country which would prevent the raising here of the poppy plant from which opium is derived, and we submit that there is no reason why the process necessary for its manufacture could not be as readily carried on in this country as elsewhere. In any event, we believe that the knowledge assumed to be within the judicial knowledge of the Court that opium is not "commercially" a domestic product is too slender a foundation upon which to base or build this presumption based upon a presumption, which is "beyond any in revenue laws or elsewhere brought to the attention of the Court". There ought to be no more practical difficulty in proving, under Section 2 of the Act in question, that the opium found in a defendant's possession was unlawfully imported into the United States, than there would be in proving, under Section 3082 of the Revised Statutes, that a dozen silk handkerchiefs found in a defendant's possession had been unlawfully imported into the United States.

In the case of *In re Wong Hane,* 108 Cal. 680, the Supreme Court of California held that an ordinance making it "unlawful for any person to have in his possession, unless it be shown that such

possession is innocent any lottery ticket'' is unconstitutional in that it places on one accused of its violation the burden of showing the innocence of his possession.

In the case of *State v. Hirsch,* 45 Mo. 429, the Court held that on the trial of an indictment under the statute of Missouri prohibiting the sale of goods, wares and merchandise, not the growth, produce or manufacture of the State, by peddlers without a license, the burden of proof is on the prosecution to show that the goods sold were not the growth, produce or manufacture of the State.

One presumption cannot be founded upon another. The only presumptions of fact which the law recognizes are immediate inferences from the facts proved.

> *Looney v. Metropolitan R. Co.,* 200 U. S. 480, 488; 50 L. Ed. 564;
>
> *United States v. Ross,* 92 U. S. 281, 283; 23 L. Ed. 707.

In the Ross case the Court uses the following language:

> ''They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed'' (92 U. S. 281, 283; 23 L. Ed. 707).

And again, on page 284 of the Ross case, the Court uses the following:

> "A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption."

See also *Manning v. Insurance Co.,* 100 U. S. 693, 697; 25 L. Ed. 761, and cases there cited.

For the above reasons, therefore, we respectfully contend that there was no evidence sufficient to authorize the jury to find that the defendant Gladstone had possession of the opium involved in this case. That even granting for the sake of this argument only that there was evidence sufficient to go to the jury, there was no evidence that the opium in question was either unlawfully imported into the United States, or imported at all, outside of the presumption attempted to be drawn under the authority of Section 3 of the Act of January 17, 1914, that this section of the Act is unconstitutional in that it places upon the shoulders of a defendant in a criminal case the burden which he could not in most instances carry, and that it therefore deprives him of his liberty and property without due process of law in violation of the 5th Amendment of the Federal Constitution.

It follows, therefore, that the action should have been dismissed upon the motion of the counsel of plaintiff in error (pages 14 and 15, Transcript of

Record) and that the Court should have advised the jury that the evidence was insufficient to sustain a conviction.

For the foregoing reasons we respectfully submit that the judgment of the Court below in the above entitled action should be reversed and a new trial granted to the plaintiff in error, Alexander Gladstone.

Respectfully submitted,

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